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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAI ACOSTA RAMIREZ,

Defendant and Appellant.

B208458

(Los Angeles County  
Super. Ct. No. KA080824)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Daniel J. Buckley, Judge. Affirmed.

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Keith F. Vickers for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Isai Acosta Ramirez on five counts arising from his unlawful sexual contact with a minor. Ramirez appeals, challenging the trial court's admission of certain sexually explicit photographs of Ramirez and the victim. We affirm.

### BACKGROUND

The information charged Ramirez with distribution of child pornography in violation of Penal Code section 311.2, subdivision (c)<sup>1</sup> (count 1), activity involving material depicting sexual conduct with a person under 18 years old in violation of section 311.2, subdivision (d) (count 2), oral copulation of a person under 16 years old in violation of section 288a, subdivision (b)(2) (count 3), sexual penetration of a person under 16 years old with a foreign object in violation of section 289, subdivision (i) (count 4), and three counts of unlawful sexual intercourse with a person under 16 years old in violation of section 261.5, subdivision (d) (counts 5, 6, and 7).

Ramirez pleaded not guilty to all counts. The trial court granted Ramirez's motion to dismiss counts 1 and 2. A jury convicted Ramirez on all five remaining counts.

The court sentenced Ramirez to 5 years in state prison, calculated as follows: the midterm of three years on count 5, plus 1 year (i.e., one-third of the midterm) on count 6, plus 1 year (i.e., one-third of the midterm) on count 7, all sentences to run consecutively. The court suspended imposition of sentence on counts 3 and 4 pursuant to section 654 pending successful completion of the sentences imposed under counts 5, 6, and 7. The court also credited Ramirez with 75 days of presentence custody and imposed various fines and fees, as well as ordering Ramirez to register as a sex offender, to submit to an AIDS test, and to provide certain DNA and other biological samples pursuant to section 296. Ramirez timely appealed.

For purposes of this appeal, only a brief summary of the facts and evidence is necessary: In January 2007, Ramirez met the victim at church. The victim testified at trial that she had sex with Ramirez on four occasions, once in June 2007, twice in July 2007, and once in September 2007.

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<sup>1</sup> All subsequent statutory references are to the Penal Code unless otherwise indicated.

When the victim first met Ramirez, she told him she was 17 years old and would be turning 18 in April, but in fact she had just turned 15. At trial, she testified on direct examination that she told Ramirez her correct age in July 2007. On cross-examination, defense counsel impeached her with her own testimony from the preliminary hearing, at which she testified that she told Ramirez her correct age on September 27, 2007. Ramirez did not testify.

Ramirez's sole defense at trial was that when he had sex with the victim he believed, reasonably and in good faith, that she was at least 18 years old, because she had told him so and had not yet told him her correct age. He did not deny that he had engaged in the alleged sexual acts with the victim, and he offered a stipulation to that effect. The prosecution refused to accept the stipulation.

### DISCUSSION

In a pretrial motion in limine, Ramirez sought to exclude certain sexually explicit photographs of himself and the victim, which investigators had found in a search of Ramirez's home and also on the victim's cell phone. At a hearing on the motion before the start of jury selection, the court expressed its inclination to grant the motion, saying tentatively that "[f]irst and foremost, I think under [Evidence Code section] 352, given that there is an agreement that he did these acts, that the prejudice outweighs the probative value. Then there is undue consumption of time, et cetera. The other thing is that . . . this is not going to be comfortable for 12 jurors to watch. Why expose them to it? The only reason you might want to expose them to it is because it's going to piss them off, to use a very nonlegal term."

Before that colloquy took place, the court had asked counsel whether any of the defense motions in limine had "to be ruled on before voir dire." Defense counsel said "I don't believe so." The prosecution said "No" but, because the motion to exclude the photographs was undecided, asked that "the court inquire of the jury about their sensitivity to viewing essentially pornographic material, oral copulation, vaginal and digital penetration." Defense counsel expressed the concern that if the motion were ultimately granted, the jury would have been tainted by the voir dire. The court then

explained, “I’m going to be asking them about their reaction to graphic testimony and so forth anyway because of the issues.” Defense counsel responded, “If it’s phrased that way, it shouldn’t be a problem.” He did not retract his previous statement that no ruling on the motions in limine was necessary before jury selection.

After the jury was selected and presentation of evidence had begun, the court again addressed the issue of the photographs during a hearing outside the presence of the jury. The court explained that when it had expressed its inclination to grant the defense motion in limine, the court “thought we were only talking about the video,” not about still photographs. The court apologized for its confusion and acknowledged that the written motion in limine “refer[red] to photos” and did not “say anything about videos.” The court nonetheless stated that the prosecution is “entitled to some photographs,” explaining that there is “a big difference” between “a three-minute video of oral copulation” and a still photograph of the same conduct. The court ultimately admitted eight still photographs as follows: two of the victim orally copulating Ramirez, apparently on different occasions (exhibits 1 and 2); one of Ramirez penetrating the victim’s vagina with his finger (exhibit 3); one of Ramirez penetrating the victim’s vagina with his penis (exhibit 4); one of the victim in a black negligee (exhibit 5); one of the victim in a black negligee orally copulating Ramirez (exhibit 6); one of Ramirez (exhibit 7); and one of the victim (exhibit 9).

On appeal, Ramirez again argues that the trial court should have excluded the photographs under Evidence Code section 352. We review the trial court’s ruling for abuse of discretion. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 275.) We conclude that the court did not abuse its discretion when it admitted the eight photographs.

Evidence Code section 352 provides that the trial court has discretion to exclude relevant evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Ramirez argues that the probative value of the photographs was substantially outweighed for the following reasons: (1) The probative value of the photographs was slight because

Ramirez had offered to stipulate to all of the elements of the charged crimes subject only to his defense of good-faith, reasonable belief that the victim was over 18, and also because the victim's statements to the police and her parents independently proved that he had engaged in the charged conduct; (2) the photographs were cumulative and led to undue consumption of time, again because of both the offered stipulation and the victim's statements; and (3) the photographs were unduly prejudicial because they made it likely that the jury would "lose objectivity and convict the defendant out of an extreme emotional reaction."

The trial court did not abuse its discretion by concluding, to the contrary, that the probative value of the photographs was not substantially outweighed. First, given that the prosecution had refused to accept Ramirez's stipulation, the photographs were highly probative of the elements of the charged crimes. Moreover, the prosecution is not required to accept a defense stipulation of the kind offered by Ramirez. (*People v. Salcido* (2008) 44 Cal.4th 93, 147, 150; *People v. Garceau* (1993) 6 Cal.4th 140, 182.) Ramirez does not argue to the contrary.

Second, the photographs were not cumulative and did not unduly consume time, because they corroborated the victim's testimony. (*People v. Farnam* (2002) 28 Cal.4th 107, 185-186; *People v. Cain* (1995) 10 Cal.4th 1, 29.) In addition, the photographs tended to show that Ramirez had sex with the victim on more occasions than she wished to admit in her testimony at trial. She initially testified to three occasions and later admitted a fourth, but the photographs (in combination with her testimony) appeared to show at least five occasions. In this way, the photographs were an important supplement to the victim's testimony, again negating Ramirez's claim that the photographs were cumulative or caused undue consumption of time.

Third, we conclude that Ramirez's argument concerning undue prejudice is not persuasive. To the extent that the jury was likely to have an emotional reaction adverse to Ramirez on the basis of the photographs, the jury was already likely to have such a reaction on the basis of the uncontradicted testimony (or Ramirez's stipulation, had it been accepted) concerning the details of Ramirez's repeated sexual contact with a minor.

(*People v. Heard* (2003) 31 Cal.4th 946, 976-978.) That is, given the nature of the crime, it was inevitable that some risk of such a reaction would be present. In view of the high probative value of the photographs, we cannot say that the trial court abused its discretion when it concluded that their probative value was not substantially outweighed by the risk of undue prejudice.

For all of the foregoing reasons, we reject Ramirez's argument that the trial court abused its discretion by overruling his objections to the photographs under Evidence Code section 352.

Finally, Ramirez also argues that because the trial court reserved ruling on the objections to the photographs until after the jury was selected, the court deprived Ramirez's counsel of the opportunity during voir dire to ask the prospective jurors about their potential emotional reactions, biases, or prejudices that might result from viewing such photographs. Ramirez contends that by reserving ruling and then overruling the objections after voir dire, the court denied his right to a fair trial.

We disagree, for two reasons. First, insofar as Ramirez is arguing that the trial court erred by reserving ruling on the objections until after jury selection, Ramirez's counsel invited that putative error by telling the court on the record that the objections did not need to be ruled on before voir dire. (*People v. Williams* (2008) 43 Cal.4th 584, 629.) We note also that this occurred *before* the court expressed its inclination (which the court later reversed) to exclude the photographs. Thus, Ramirez cannot argue that his counsel's failure to request a definitive ruling before voir dire was caused by the court's tentative ruling in Ramirez's favor—the court had not yet expressed its tentative ruling on the objections when counsel said that no final ruling was needed before voir dire.

Second, the record shows that the court's reservation of ruling, whether erroneous or not, did not deprive Ramirez's counsel of the opportunity to examine the potential jurors about their reactions to sexually explicit photographs. The reporter's transcript reflects that far from expressing interest in conducting such an examination, defense counsel opposed the prosecution's request for such questioning on the ground that it would taint the jurors unnecessarily "if [Ramirez were] successful in getting those

photographs suppressed.” When the court explained that it would question the potential jurors “about their reaction to graphic testimony and so forth anyway,” defense counsel said that “[i]f it’s phrased that way, it shouldn’t be a problem.” Thus, the record does not support Ramirez’s contention that he was prevented from conducting a more searching inquiry on voir dire. On the contrary, he acted to prevent the court and the prosecution from conducting such an inquiry themselves. And again, all of this discussion took place before the trial court expressed its inclination to exclude the photographs.

For all of these reasons, we reject Ramirez’s argument that the trial court’s reservation of ruling on the objections to the photographs until after voir dire violated Ramirez’s right to a fair trial by preventing him from adequately questioning the potential jurors.

#### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

BAUER, J.<sup>\*</sup>

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\* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.